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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JAZMIN R., a Person Coming Under
the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

REBECCA R.,

Defendant and Appellant.

G046676

(Super. Ct. No. DP020203)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kimberly
Menninger, Judge. Affirmed.

Janette Freeman Cochran, under appointment by the Court of Appeal, for
Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Julie J.
Agin, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

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Rebecca R. (the mother) appeals the termination of her parental rights to her daughter, Jazmin. She contends the court erred by finding the benefit exception of Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(v)¹ did not apply and by concluding that Jazmin was adoptable. Because neither of these contentions has merit, we affirm the order.

I

FACTS

We summarize the facts with our focus on the issues most pertinent to the appeal.

Detention, Jurisdiction and Disposition

In August 2010, when Jazmin was four and a half years old and her brother Daniel was three months old, the mother left both children with a babysitter. She did not return for three days, and left no support or emergency contact information. Daniel's father² then retrieved the children from the babysitter and cared for them for four days before relinquishing them to the Orange County Social Services Agency (SSA).

The petition, filed on August 26, 2010, alleged failure to protect under section 300, subdivision (b). Among other things, it was alleged the mother had an unresolved substance abuse problem dating back at least 10 years which included the abuse of alcohol and the use of methamphetamine, cocaine and ecstasy. The mother was alleged to have used drugs while the children were present. Further, it was alleged the mother had unresolved and untreated mental health issues, including bipolar disorder and schizophrenia. The petition also alleged abuse, including excessive physical discipline

¹ Subsequent statutory references are to the Welfare and Institutions Code.

² Jazmin and Daniel have different fathers. Jazmin's father's whereabouts were never ascertained. Daniel is not the subject of this appeal.

on Jazmin, and the failure to provide her with proper medical care (she had ringworm and lice at detention). The petition stated the mother lived a transient lifestyle, moving the children frequently and leaving them in the care of friends. Additionally, it was alleged the mother was a prostitute and had engaged in sexual activity while the children were in the room. The petition noted the mother had three older children living in Florida with their fathers, and she had failed to foster a relationship or to provide support for them.

In the initial report to the child abuse registry, Jazmin reported that her mother's boyfriend was named "Evil." The reporting party was "under the impression that Evil is in fact the mother's pimp." Jazmin "has reported that Evil acts mean towards her mother and sibling and that Evil takes all of the mother's money away." The referral also stated that the mother had used injected drugs in the children's presence.

Daniel's father told the investigating social worker that the mother was "a prostitute working the streets in Santa Ana and he has seen her walking/working on First Street." She sent him text messages describing the sexual acts she performed because "I have to survive." He informed the social worker of the mother's drug history and history of mental illness.

When interviewed, the mother denied that she had left the children for three days, but said that after the babysitter called her at work and reported an argument between she and Jazmin, the mother asked Daniel's father to pick them up from the babysitter. She said she did not retrieve the children from him because she was afraid he would be violent.

The mother denied engaging in prostitution currently, but admitted working for an escort service when she was 19. (A police report found later reported her arrest for prostitution on August 25, 2010 in an undercover operation.) With respect to drugs, she stated she had been clean for 10 years, but admitted drug use as recently as two months prior.

Jazmin and Daniel were placed with foster mother Wendy M. in late September. In October, the court sustained the petition, removed custody from the mother, and ordered her to participate in the case plan.

Six- and Twelve-Month Review

The six-month review was originally scheduled for April, but was continued a number of times for reasons not pertinent here. It was ultimately held in September as a combined six- and twelve-month review, at which time the court had numerous reports and addenda from SSA to consider.

SSA recommended terminating services as to Jazmin and setting a hearing to select a permanent plan. In addition to her August arrest, the mother was arrested again on prostitution charges on October 30. She did not engage with SSA at all until March 2011, when she told the social worker she had not been visiting the children or maintaining contact because she had a warrant out for her arrest due to failure to appear in court. As of the social worker's April report, the mother had not complied with any aspect of her case plan, which included psychological evaluation and counseling, a personal empowerment program, parenting education, substance abuse treatment, and drug testing.

When she finally met with the social worker after missing two scheduled meetings, the mother reported her prostitution charges had been dismissed, but she was also homeless. She acknowledged using methamphetamine from June to December 2010, but she had stopped because she ran out of money.

Jazmin, meanwhile, continued in her foster placement during the initial reporting period ending in April 2011. Her ringworm and lice issues had been resolved, and she was developmentally on target. Jazmin suffered from occasional bad dreams where a man was trying to kill her, her father and her mother. She was receiving weekly

therapy in the home from therapist Jody Spellmeyer, with the goal of decreasing depression and anxiety and maintaining age-appropriate development.

In January, Spellmeyer noted that Jazmin avoided talking about her past or her mother, and felt depression and anxiety related to abandonment issues about her mother. Jazmin had also had some issues with enuresis and encopresis at home and in daycare. By the end of March, Spellmeyer reported that Jazmin was “consistent and very cooperative in therapy” and was able to talk about her mother without anger, although she still did not report new information about the past. She continued to have some issues with bedwetting and defiant behaviors, but Spellmeyer felt she was progressing and using therapy to work on those issues.

Additionally, Jazmin participated in appropriate extracurricular and social activities with her foster mother, Wendy, and her brother. She enjoyed attending church and church activities. Wendy also reported that Jazmin, while she had some behavior issues, was “happy with most people,” and described her as a happy, loving child. She had started calling Wendy “mom.”

During this period, the maternal grandmother was considered as a possible placement for Jazmin, but the mother reported molestation by the grandmother’s husband and Jazmin reported he had hit her with a belt.

As of May, the mother had not visited Jazmin since detention the previous August. With input from Spellmeyer, some visits took place during May, and Spellmeyer reported regression for Jazmin afterward. Around the same time, Daniel began overnight visits with his father. These two factors coming together tied in with Jazmin’s abandonment issues.

With respect to Daniel, Spellmeyer reported that Jazmin cared for him and enjoyed being around him, but was also able to separate from him easily. “Her regression is more regarding being loved, being cared for, and being abandoned (where

her brother gets to go with ‘daddy’ and that her mother is back in the picture and what that really means).” Spellmeyer also reported that she “does not notice a difference of the bond between Jazmin and Daniel versus Jazmin and the other one-year-old, foster child who was in the home.” Wendy concurred, reporting that although Jazmin loved her brother, she did not see a strong bond between them. Daniel’s father said that he believed there was a bond between Jazmin and Daniel, and should the children end up residing in different homes, he planned to continue ongoing contact.

Overall, and we need not dwell on the details due to the limited issues on appeal, both the mother’s visits and her attempts to comply with her case plan were inconsistent. In June, Wendy reported that Jazmin’s behavior had been problematic since visits had resumed. She blamed herself for her mother’s inconsistency, and felt that her “naughty” behavior was why she could not live with her parents.

On September 19, without mother present, the court terminated services and set a hearing to select a permanent plan. SSA later learned the mother had been in Florida, was incarcerated there a few weeks later, and subsequently placed on one year of probation. As of December 29, she did not have her probation officer’s approval to travel out of state.

After Termination of Services

During the period prior to the section 366.26 hearing, a number of relative placements were considered and rejected for various reasons. Placement with Daniel’s father was also rejected, because he was currently working on reuniting with Daniel.

In late September, Spellmeyer reported that Jazmin was doing generally well and adjusting to the lack of contact with the mother. She stated Jazmin’s permanent placement must meet her need for stability and address her issues regarding abandonment. In late October, she reported Jazmin was progressing in therapy and

speaking a bit more about “forever home” and “forever family.” She continued to deal with abandonment issues and worries about what the future held for her. Jazmin was aware that Daniel’s forever home would be with his father.

With regard to adoption, SSA reported the adoptions supervisor had concluded that “based on the characteristics/attributes, it is probable that the child would be adopted, but the child is difficult to place for adoption, and there is no identified adoptive family because: the child membership in a sibling group.”

In December 2011, the adoption social worker identified several families as potential matches for Jazmin, but she would not be matched until a final decision had been made regarding relative placement.

Jazmin also began to express that she wanted her forever home to be with friends of the foster mother from her church, Melissa and Jamie, who were also licensed foster parents.³ Melissa and Jamie’s previously conducted home study indicated they were not comfortable accepting placement of children whose parents had a history of bipolar disorder or schizophrenia, and they were initially ruled out as potential adoptive parents due to the mother’s history. Other relatives of the mother were ruled out at this time due to potential financial hardship.

In January 2012, SSA reported that Daniel had been placed in his father’s home in mid-December for a 60-day trial visit. The foster mother reported Jazmin had adjusted well to the change, and she had two visits with Daniel in December. SSA also reported that Jazmin, age five, was doing well, and that since she last saw her mother, her enuresis incidents had dramatically decreased. She was developmentally on target, doing well, outgoing and talkative. She enjoyed church and extracurricular and social

³ The foster mother admitted Jazmin and Daniel had unauthorized, unsupervised contact with this couple.

activities, and was sleeping through the night. She did not have a learning disability or special education needs.

Spellmeyer also reported progress. Jazmin was “better able to verbalize her feelings and manage any triggers of anxiety and is able to better cope with them. Her potty accidents have improved over the past several months” since contact with her mother ended. “Jazmin is no longer internalizing and is able to verbalize her feelings, which includes that ‘it’s not her fault her mother left.’” She was also adjusting to the change of Daniel’s absence, and processing her thoughts and feelings. She continued to talk about her “forever home.”

Section 366.26 Hearing

At the January 2012 hearing, Jazmin’s counsel called Melissa to the stand. The only limitation she recalled placing on the type of child she was willing to adopt was one with a condition “such as AIDS that would possibly die soon or not have a long life expectancy.” She and her husband had met Jazmin in church, and she testified she had spent at least 100 hours with Jazmin at church, babysitting, and watching her soccer games. They had also cared for Jazmin and Daniel overnight.

With respect to Jazmin’s behavior, Melissa testified that she had seen one incident of enuresis and had heard about the encopresis. While she had minor concerns about Jazmin’s behavior, these did not raise a concern regarding caring for Jazmin and helping her to understand what was appropriate. She was not “scared off” by Jazmin’s behavior or history. She was willing to adopt Jazmin immediately, and she later told SSA she would encourage contact between Jazmin and Daniel.

The mother’s counsel wanted to call Jazmin to the stand to testify about the bond between Jazmin and the mother. Jazmin’s counsel objected, referring to her as a “very fragile five year old” who had experienced “serious traumas in her life.” The trial

court denied the request, ruling that it did not believe her testimony “in light [of] who she is and how old she is is going to be relevant” The court also agreed with counsel that Jazmin was “fragile” and that testifying might be detrimental to her mental health.

Spellmeyer also testified. In addition to discussing issues previously related by the social worker, she stated that Jazmin was capable of bonding with people and that a loving, permanent home would help with her anxiety and abandonment issues. With regard to Daniel, Spellmeyer opined that although Jazmin loved him and missed him when he left the foster home, she would be able to deal with the possibility that visitation might cease completely. Overall, she believed Jazmin had improved significantly since beginning therapy in 2010, and the symptoms she was presenting were treatable.

At the conclusion of the hearing, the court found by clear and convincing evidence that Jazmin was adoptable, both generally and specifically. The court also found that termination of parental rights was in Jazmin’s best interest, and none of the exceptions applied. The court indicated that even if Jazmin’s relationship with Daniel could not be maintained, adoption would still be in her best interest. The court ordered, however, that while jurisdiction continued, Jazmin’s and Daniel’s relationship was to be maintained. The court terminated parental rights, and the mother now appeals.

II

DISCUSSION

Benefit Exception

The mother argues the trial court erred by refusing to apply section 366.26, subdivision (c)(1)(B)(v), typically known as the sibling benefit exception. We review

findings as to the section 366.26 exceptions under the substantial evidence rule.⁴ (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) “[W]e presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]” (*Ibid.*)

Once the juvenile court determines that there is no probability of reunification, adoption is the preferred permanent plan. (§ 366.26; *In re Edward R.* (1993) 12 Cal.App.4th 116, 122.) Should the court find it likely that the child will be adopted if parental rights are terminated, the burden shifts to the parent or parents opposing adoption to demonstrate that termination would be detrimental to the child under one of four statutory exceptions. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164.)

One of these is the sibling benefit exception, which requires an affirmative showing “[t]here would be substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child’s best interests, including the child’s long-term emotional interest, as compared to the benefits of legal permanence through adoption.” (§ 366.26, subd. (c)(1)(B)(v).)

⁴ In *In re C.B.* (2010)190 Cal.App.4th 102, 122-123, the court held “the abuse of discretion standard governs review but [we] also recognize that the substantial evidence test applies to pure findings of fact” in determining issues under the section 366.26, subdivision (c)(1)(B) exceptions. The court also noted “[t]he practical differences between the two standards of review are not significant.” [Citation.]” We find that to be the case here.

Courts employ a two-step procedure in determining whether to apply the sibling benefit exception. First, the party seeking to invoke the exception must show a substantial interference with a sibling relationship, including showing the relationship is significant and its severance would be detrimental to the child. If this is established, the court then weighs the child's best interest in continuing that sibling relationship against the benefit the child would receive by the permanency of adoption. (§ 366.26, subd. (c)(1)(B)(v); *In re L. Y. L.* (2002) 101 Cal.App.4th 942, 951-952.) Moreover, we are obliged to uphold the judgment "even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence. [Citation.]" (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

More than substantial evidence exists to uphold the judgment in this case. While the mother argues that Jazmin's relationship with Daniel was sufficiently substantial and terminating the mother's rights would substantially interfere with that relationship, the record is replete with facts from which the trial court could draw the opposite conclusion. After Daniel moved to his father's home for the 60-day trial visit, Wendy reported that Jazmin was adjusting well to the change. Further, by the time of the section 366.26 hearing, Spellmeyer testified as to Jazmin's improvement and that she was able to adjust to the change of Daniel's departure. Both Spellmeyer and Jazmin's caretaker stated in June 2011 that she "did not [have] a strong bond" with her brother Daniel. According to Spellmeyer, while Jazmin "cares for Daniel" and enjoys his company, she was able to separate from him easily. Her feelings of being left out when Daniel began to visit overnight with his father was more readily credited to her abandonment issues and feeling left out than it was to missing Daniel. Spellmeyer did not notice a difference between the bond Jazmin had with Daniel and the other one-year-old foster child living in the home. Wendy agreed.

From this evidence, the trial court could reasonably conclude that the relationship between the siblings was not so significant that severing it completely would be detrimental to Jazmin. Further, there was also substantial evidence that any detriment was outweighed by the benefits of adoption. The benefits of adoption are particularly significant in this case, given Jazmin's overwhelming need for security and stability. Not only would Jazmin have the general benefits of a permanent, loving home, but there was also strong evidence before the trial court that the sibling relationship would continue. Thus, we find no error.

Adoptability

“The juvenile court may terminate parental rights only if it determines by clear and convincing evidence that it is likely the child will be adopted within a reasonable time. [Citations.]” (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1204.) ““Clear and convincing” evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.]’ [Citation.]” (*In re Amelia S.* (1991) 229 Cal.App.3d 1060, 1065.) On appeal, we review the juvenile court's decision for substantial evidence. (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 224.)

The issue of adoptability focuses on the child, specifically, whether the child's age and physical and emotional condition are likely to make it difficult to find an adoptive placement. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) The mother points to the court's comments when it determined Jazmin should not testify, as well as her behaviors and need for ongoing therapy. She further argues the court did not have an adoption assessment report.

The court determined that Jazmin was “adoptable generally and also specifically.” The court noted: “We had a witness who came forward and testified that she has spent a lot of time with Jazmin, finds her to be someone she wants to adopt, and she and her husband appear to be prepared to go forward with the adoption. [¶] Nothing that was brought up from counsel for the mother about any of Jazmin’s issues that she’s been dealing with. None, quite frankly, are very serious, have either remotely deterred this family from wanting to be a part of her life and to have her forever with them.”

This witness, Melissa, had spent over 100 hours with Jazmin, including a number of overnight visits. She had no reservations regarding Jazmin or her history. While she had seen one instance of enuresis and was aware of encopresis incidents, neither these nor other behaviors raised a concern or scared her off. She was willing to adopt Jazmin immediately and would encourage contact between Jazmin and her brother. In addition to Melissa, the adoptions social worker had identified several families as prospective adoptive homes.

Further, Jazmin was physically healthy and developmentally on target. Her foster mother described her as a “smart girl” and she participated in age appropriate activities. She had shown improvement once the key source of stress in her life — the mother’s inconsistency — was no longer a key factor. The court’s finding that she was unable to testify was not determinative either. A five year old’s ability to be a witness in court does not bear on whether she was likely to be adopted, as different factors weigh into each calculation.

A prospective family’s willingness to adopt is indicative of a likelihood of adoption within a reasonable time by that family, or by another family. (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1650.) While the mother points to a number of possible adoptive placements that were ruled out by SSA, that alone is not enough to support the conclusion that Jazmin was unadoptable, especially in light of prospective parents who

wanted to adopt her. The record demonstrated the court carefully considered this issue, concluding that Jazmin's behavioral problems did not present a bar to adoptability. In sum, there was sufficient evidence upon which to base the court's finding of adoptability, and we therefore find no error.

III

DISPOSITION

The court's order is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.